SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 465

AIR TRANSPORT ASSOCIATES, INC.,
Petitioner,

vs.

CIVIL AERONAUTICS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY TO BRIEF OF RESPONDENT IN OPPOSITION

Respondent, in its Brief in Opposition (p. 9), erroneously charges petitioner with seeking to raise questions which were not presented in this case, and states that questions 1-3 (Pet. pp. 3-4) *assume* that the Board determined petitioner violated regulations by applying standards not in effect when petitioner obtained its Letter of Registration. This erroneous charge is refuted by the record. The revocation orders of the Civil Aeronautics Board, Serial Nos. E-5723 (J. A. 27), E-5789 (J. A. 30) and E-5877 (J. A. 32-47)

as amended by Order Serial No. E-5892 (J. A. 49) were based upon Part 291 of the Economic Regulations of the Civil Aeronautics Board, as specifically shown in said orders.

Prior to December 10, 1948, the regulation under which Petitioner was operating did not restrict the number of trips permitted in a given weekly period.[1] On December 10, 1948, petitioner's operations were for the first time restricted by the Board's ten "interpretations" of irregular and regular service as set forth in Regulation Serial No. ER-136 (J. A. 57-63) and later amended by Regulations Serial No. ER-151 and ER-154 (App. to Pet. Brief pp. 53-59).

Respondent makes the assertion (Brief in Opposition, p. 9) that the 1948 regulation "did not alter or contract the privileges of the exempt carrier. It aimed simply at providing guidance to the industry." Irrespective of whether it was "aimed at providing guidance to the industry," nevertheless it was in the form of a regulation which by its terms limited and restricted petitioner's license. That this statement of respondent that the 1948 regulation did not alter or contract petitioner's privileges is erroneous is apparent from simply reading and comparing the regulation in effect when petitioner commenced business (J. A. 358) with the charts contained in the regulation adopted December 10, 1948 (J. A. 59-63). These charts were not in effect prior to December 10, 1948. The original license contained no measure or standard for determining when flights were to be considered irregular or infrequent. Thus, it will be seen this 1948 regulation clearly established for the first time a measure or standard for

[1] Section 292.1 of the Economic Regulations, Civil Aeronautics Board, (J.A. 57-63 and Pet. for Cert. 40-47). Section 292.1 of the Economic Regulations was recodified as Part 291 of the Economic Regulations, effective July 1, 1949, 14 F.R. 3546.

determining whether flights were to be considered irregular and infrequent. Therefore, the record amply supports questions 1-3 (Pet. pp. 3-4)[2] contra to respondent's charge that these questions are not presented by the record in this case.

Petitioner urges that this regulation should legally be regarded as amending petitioner's previously existing license. Therefore, adjudicatory hearings for the benefit of persons holding such licenses were necessary before it could be lawfully promulgated.[3]

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[2] Questions 1 and 3 in the Petition are as follow:

"1. Where a license granting operating authority is issued by the Board to an air carrier, which acquires property and business while operating thereunder, may the Board thereafter issue and lawfully enforce a new regulation which amends the carrier's license and substantially injures and destroys its property interests and business by diminishing and curtailing its operating authority, in the absence of an adjudicatory hearing upon the regulation prior to its issuance as prescribed by the Administrative Procedure Act?"

"3. Where a license is granted pursuant to a regulation adopted through proper rule-making procedure, which regulation defines permissible operations in general terms (i.e., 'does not hold out a regular service'), and a licensee commences operations and makes a business investment in reliance upon such regulation, may the agency thereafter lawfully issue a document called an 'interpretation' but having the force of a regulation, which document substantially curtails and restricts the prior definition of permissible operations without complying with the rule-making procedures set forth in the Administrative Procedure Act, 5 U.S.C. 1008(b)?"

[3] The court below in its "statement" accompanying its certificate to this Court filed June 12, 1952, in the case of *Civil Aeronautics Board, et al.* v. *American Air Transport, Inc., et al.*, No. 11,115 in that court (and subsequently No. 126, October Term, 1952, in this Court) stated:

"No majority of this court is able to agree upon a disposition of this case. *The three judges are in agreement that, if a new regulation should legally be regarded as amending existing licenses, adjudicatory hearings for the benefit of existing licensees are necessary.* (Italics supplied.) The differences are as follows:

"One judge would affirm the judgment of the District Court for these reasons: He thinks the new Regulation inserts into the appellees' pre-existing license a crippling limitation of the number of

The regulation in effect when petitioner started business (J. A. 358) provided:

> "An Irregular Air Carrier * * * (3) which *does not hold out to the public,* expressly or by a course of conduct, that it operates one or more aircraft between designated points, or within a designated point, *regularly or with a reasonable degree of regularity* upon which aircraft it accepts for transportation, for compensation or hire, such members of the public as apply therefor or such property as the public offers. No air carrier shall be deemed to be an Irregular Air Carrier

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irregular trips permitted thereunder, the licenses theretofore having been unrestricted in that respect, which will substantially injure and in large part destroy the existing property and business of the appellees. He thinks the insertion of such a restriction into the licenses originally unrestricted constitutes an amendment of the licenses which, under the Constitution and the statutes, is invalid without an adjudicatory proceeding.

"One judge would reverse the judgment of the District Court, being of the opinion that, when licenses are issued under a regulation of a licensing agency, an amendment of the regulation which defines its terms in ways not shown to be arbitrary or capricious, duly adopted by a rule-making procedure and without an adjudicatory proceeding as to any affected licensee, is not to be regarded as amending licenses and is valid although it will have the effect of destroying substantial parts of the business of licensees.

"One judge is of opinion (1) that the decisive question is whether the specific prescriptions of the new Regulation are or are not a proper, or reasonable, definition of the undefined terms ('regularly or with a reasonable degree of regularity') of the original licenses and (2) that that question is a question of fact which must be determined upon factual criteria, devised from studies of actual operations of regular carriers and of irregular carriers, similar to the criteria utilized by the three-judge court in Brady Transfer & Storage Co. v. *United States* for like purposes under the Motor Carrier Act, and similar to the data which the Board says it used in formulating the Regulation here involved. Since the present record contains no evidence here of that sort, this judge would remand the case to the trial court for the receipt of such evidence and a finding of basic facts and an ultimate finding therefrom as to whether the new Regulation does or does not in fact change the terms of the existing licenses." (Italics supplied.)

[Note: This latter judge's opinion was later adopted by all three judges in the court below in the *American Air Transport* case.]

unless the air transportation services offered and performed by it are of such infrequency as to preclude an implication of a uniform pattern or normal consistency of operation between, or within, such designated points. Within the meaning of this definition a 'point' shall mean any airport or place where aircraft may be landed or taken-off, including the area with a 25-mile radius of such airport or place." (Italics supplied)

The regulation in effect when American Air Transport, Inc. commenced business provided:

"every air carrier which engages solely in non-scheduled operations shall be exempt from the provisions of Section 401 and all other provisions of Title IV of the Civil Aeronautics Act . . . .

"Within the meaning of this regulation any operation shall be deemed to be nonscheduled if the air carrier *does not hold out to the public,* by advertisement or otherwise that it will operate one or more airplanes between any designated points *regularly or with a reasonable degree of regularity* upon which airplane or airplanes it will accept for compensation or hire such members of the public as may apply therefore (sic) or such express or other property, as the public may offer." (Italics supplied)

A comparison of the language of the two above-quoted regulations in effect when each of these carriers started its operations shows that they are substantially the same.

The licenses of petitioner and American Air Transport, Inc., based upon the same wording "regularly or with a reasonable degree of regularity," were revoked upon the Board's findings that they operated outside the terms of their licenses in that they operated "regularly or with a reasonable degree of regularity."

If the regulation of December 10, 1948, was not an amendment of petitioner's previously existing license as respondent contends, then the decisive question turns on the mean-

ing of the terms "regularly or with a reasonable degree of regularity" as set out in petitioner's original license. These terms are identical in both the license of petitioner and the license of American Air Transport. The court below in the *American Air Transport* case held these words to be "undefined terms of the original licenses." That court further held that the meaning of these terms could only be determined upon factual criteria obtained from evidence based upon studies of actual operations of both regular and irregular carriers. In the *American Air Transport* case the court below applied the same criteria in that case which were utilized by the three-judge court in *Brady Transfer and Storage Company* v. *United States.*[4]

If the Board has convicted petitioner upon the terms of its original license as respondent asserts, Brief in opposition pp. 7, 10, then we have the situation where the court below in the *American Air Transport* case, decided four months and ten days after its decision in the instant case, held that the terms "regularly or with a reasonable degree of regularity" were *undefined terms.* Although the same identical terms are used in petitioner's license and in the *American Air Transport* case, that is, "regularly or with a reasonable degree of regularity," the court below refused to convict American Air Transport until the "undefined terms" had been defined by the trial court upon evidence taken based upon operations of regular and irregular air carriers. Such undefined terms have not been defined in the instant case. Petitioner has been convicted and is about to be executed under the "death edict" decisions of the Civil Aeronautics Board and the court below, notwithstanding the fact that the regulations which petitioner has been found guilty of violating are expressed in "undefined

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[4] 80 F. Supp. 110 (S. D. Iowa 1948), *Aff'd.,* 335 U. S. 875, 93 L. Ed. 418, 69 S. Ct. 239 (1948).

terms." In other words, petitioner here is in the same position as a person who has been convicted of an alleged crime for which he is about to be executed, when that crime is described in "undefined terms." For the same reasons that this Court would not uphold such a conviction, much less permit a person to be executed upon conviction of an alleged crime that is set forth in a statute describing the crime in *undefined terms*, so this Court is urged by petitioner to not permit this petitioner, a going business concern, to be prohibited from continuing its business because of alleged wilful violations of these *undefinable terms* "regularly or with a reasonable degree of regularity," which were contained in its original license.

How can petitioner be held to have operated "regularly or with a reasonable degree of regularity" until it has been determined what those terms mean? And that has not been determined in the instant case.

As in the case of *Civil Aeronautics Board* v. *American Air Transport, Inc., supra*, the present record now before the Court in the instant case does not contain evidence of studies of actual operations of regular carriers and of irregular carriers similar to the criteria utilized by the three-judge court in *Brady Transfer and Storage Company* v. *United States, supra*, which this Court affirmed in 335 U. S. 875. Therefore, in justice to petitioner, and in the interests of fair dealing on the part of an agency of the United States Government with its citizens, it is respectfully urged that the Court should grant this petition.

After this Court dismissed the certificate of the court below [5] in *Civil Aeronautics Board* v. *American Air Trans-*

[5] Opinion of the Court entered Oct. 20, 1952, in *Civil Aeronautics Board* v. *American Air Transport*, Case No. 126, October Term, 1952. Pet., pp. 2, footnote 2, sets forth the opinion of this court in that case. The questions were certified by the court below in the following language:

"This court is unanimously of opinion that the question presented is of far-reaching and fundamental importance in the field of admin-

port, the two judges of the panel of the court below that heard that case who previously voted for affirmance and reversal respectively on November 20, 1952, changed their vote, voted with the third judge for remand (see footnote 3) and the court below then returned that case to the lower court with the following *per curiam* opinion:

> "Per Curiam: We certified this case to the Supreme Court. U. S. App. D. C. —, — F. 2d —. On October 20, 1952, the Supreme Court dismissed the certificate. — U. S. —. The circuit judge who formerly voted for affirmance and the circuit judge who formerly voted for reversal now concur with the circuit judge who formerly voted for remand. The case is remanded to the District Court for further proceedings in accordance with the opinion of that judge as set forth in our certificate filed June 12, 1952.
>
> Remanded."

The direct conflict between the decision of the lower court in the instant case and the decision of this Court in *Brady Transfer & Storage Co.* v. *United States, supra*, has been emphasized by the recent action of the court below after rendering its decision in the instant case, in remanding

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istrative law. Therefore, this court respectfully requests the instructions of the Supreme Court upon the following question: (Italics supplied)

"Where operating authority is granted by a regulatory agency and a private company operating thereunder acquires property and business in so doing, is a new regulation of the agency which in fact substantially injures or in large part destroys such property interests or business

(1) void as to that licensee unless an adjudicatory hearing is held, because it is on its face an amendment of his license; or

(2) valid if adopted by a rule-making procedure, provided the new regulation merely defines the terms of the old in ways not shown to be arbitrary or capricious; or

(3) does its validity as to that licenseee depend upon a finding of fact that it does or does not in fact vary the terms of the license; or

(4) does its validity depend upon some other condition?"

to the District Court the case of *Civil Aeronautics Board* v. *American Air Transport, et al., supra,* for the receipt of such evidence or criteria as was deemed essential in the *Brady* case, to-wit, a finding of basic facts and an ultimate finding therefrom as to whether the new regulation does or does not in fact change the terms of the existing licenses.

Further, the recent decision of the court below in the case of *Civil Aeronautics Board* v. *American Air Transport, et al., supra,* in which a similar question involving the issuance of a new regulation, after the issuance of an operating license, by the Civil Aeronautics Board, limiting the permissible frequency and regularity of operations, demonstrates an intra-circuit conflict.

The same terms "regularly or with a reasonable degree of regularity" are in both the licenses of American Air Transport and petitioner. In the case of the former the court below refused to decide if American violated that term of its license because that term is "undefined" and it refuses to decide if the Regulation involved in that case does or does not in fact change the terms of the existing license until the "undefined" terms are defined. In the instant case, though alleged violation of the same "undefined" terms is the very crux of the case against petitioner, the court has held it violated those "undefined" terms and that finding and as well the further finding that the Regulation here involved did not in fact change the terms of the existing license have been made without "a finding of basic facts and an ultimate finding therefrom" by either the court or the Board.

Obviously, the court below could not be right in its decisions in both cases. Petitioner respectfully submits that it was right in the action it took in the *American Air Transport* case because that action was in conformity with the previous decision in the case of *Brady Transfer & Storage Co.* v. *United States, supra,* which this Court affirmed; and

was wrong in the action it took in the instant case. This situation merits the supervision of this court by review upon the granting of this petition.

When "regularly or with a reasonable degree of regularity" shall have been defined by the courts in the *American Air Transport* case, it may well appear that with that definition applied to petitioner's alleged violations, it in fact did no wrong.

Petitioner meanwhile will have been put out of business, will have lost its business and lost its customers and will have lost the traffic it has built up since 1948; its organization of highly trained, competent and efficient personnel skilled in air transportation will have been disbanded, most of its investment will be lost and its business ruined. Petitioner may then realize, after it is too late, that it has been convicted under a regulation later held invalid. By granting this petition, this Court can thus avoid this unjust, unfair and inequitable situation.

Respondent, without justification, asserts in its footnote 5 on page 9 of Brief in Opposition that petitioner has not presented the contention advanced below that the Board's standard of regularity is void for vagueness. This assertion overlooks the statement appearing on page 12 (paragraph 4) of the petition. While it is true the word "vagueness" was not used, nevertheless the words "invalid for uncertainty" as used by petitioner certainly convey the same idea as "vagueness." In order that there may be no question as to petitioner raising this question, the Court is now urged that the terms "regularly or with a reasonable degree of regularity" used in petitioner's license are "undefined terms." They are meaningless until they are defined. The lower court has held in the *American Air Transport* case that they cannot be defined without evidence, and there is no such evidence in this case. Further, if the regulation of December 10, 1948, is meant to be, as it is, an

amendment of petitioner's license by way of a "definition" of the "undefined" terms used therein, then it is unenforceable against petitioner if it alters the meaning of the terms "regularly or with a reasonable degree of regularity" as contained in petitioner's original license, because it was put into effect after the issuance of petitioner's license and without complying with the Administrative Procedure Act.

In addition, these regulations of December 10, 1948, and July 1, 1949, are so vague, indefinite, and uncertain that they are void and invalid. They are also contrary to the purpose of the Civil Aeronautics Act as set forth in Section 2 of that Act.[6] They are also discriminatory because they impose restrictions without any reasonable relation to the purpose of the Civil Aeronautics Act.

Respondent in its Brief in Opposition takes the position that Section 9 (b) of the Administrative Procedure Act,

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[6] Section 2 of the Civil Aeronautics Act (52 Stat. 980, 49 U.S.C. 402) provides: "In the exercise and performance of its powers and duties under this Act, the Authority shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity—

"(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

"(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

"(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

"(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

"(e) The regulation of air commerce in such manner as to best promote its development and safety; and

"(f) The encouragement and development of civil aeronautics."

providing that before a license shall be revoked the licensee shall be given warning and accorded an opportunity to achieve compliance, does not apply because the Board and the court below have found that the violation here charged was "willful." Petitioner respectfully submits that the terms "regularly or with a reasonable degree of regularity," as used in the regulation in question, are "undefined terms," as held by the court below in the *American Air Transport* case; and there can be no "willful" violation of a regulation couched in "undefined terms." The word "regularly" is a relative term, and must be compared with operations of regular and irregular carriers as required in the case of *Brady Transfer and Storage Company* v. *United States, supra.*

The Administrative Procedure Act attempts to correct many evils which developed in the administrative process. One such evil, according to Congressman Walter, is "the very severe consequences of the conferring of licensing authority upon administrative agencies * * *. The purpose of this section is to remove the threat of disastrous, arbitrary and irremediable administrative action."[7]

The Board finds that petitioner "willfully" violated the Civil Aeronautics Act, and at the same time the Board refuses even to look at evidence of the public interest tendered by petitioner which would show (1) that there was a desperate need for petitioner's services, (2) that other carriers were unable to supply the air service needed, and (3) that the application of rules governing domestic interstate air transportation within the states should not be applied to overseas transportation between the states and Alaska.

Unless such evidence is considered, the Board could not properly find that petitioner acted "willfully," except in the arbitrary manner which the Board here followed.

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[7] Congressional Record, May 24, 1946, p. 5759.

The Administrative Procedure Act is designed in part to limit such arbitrary action. This Court should grant the petition for certiorari to make clear that the exception in 9 (b) of the Administrative Procedure Act cannot be used to continue the very arbitrary action it was designed to correct.

The decision of this Court upon the questions presented here will not only affect petitioner but the questions involved are of vital importance to all large irregular air carriers in this industry which serves the small businessmen, the middle class citizens of America and the lower salaried population by providing them with low-cost air transportation which would not otherwise be available to them. Attention is invited to the *amicus curiae* brief submitted by Aircoach Transport Association, Inc., the trade association of this industry.

It is significant that respondent's Brief in Opposition does not deny that this case presents a question of public importance with respect to the impact upon the irregular carrier segment of the air transportation industry of a Regulation limiting the frequency and regularity of the operation of such air carriers; that this Regulation is presently being enforced against many air carriers in proceedings now pending before the Civil Aeronautics Board and proceedings under judicial review in which the validity of such Regulations is challenged, as here; and this is the first time this question is before this Court for decision. Unless this Court takes jurisdiction and decides this important question in the field of administrative law, the validity of this and similar Regulations adopted in the same way by other Government agencies without complying with the requirements of the Administrative Procedure Act will remain unsettled, and a decision by this Court now will be helpful to every other irregular air carrier, of which 55

operated more than 55,000,000 passenger and cargo miles between July, 1949 and July, 1950 (J. A. 637).

Respondent does not deny that the Senate Select Committee on Small Business which investigated the status of the carriers in the class to which petitioner belongs found these carriers required a bare minimum of 14 to 15 flights a month between the same points to be economically necessary to justify their continued operation and that this Regulation jeopardizes the economic strength of these carriers to such an extent that they cannot continue their operations and meet their operating expenses.

Neither does respondent's Brief in Opposition deny, as pointed out by the Senate Committee, that (Pet., p. 12) the regulation of irregular carriers involves a broad public interest—that of determining the kind of civil aviation which America is to have in the future and the non-scheduled air carriers constitute an asset that the nation ought not to lose.

Conclusion

As the issues here presented are vital to the irregular air carrier industry, and the general public who utilize its low-cost transportation, and are of far reaching and fundamental importance in the field of administrative law for which there is a precedent-making need for a pronouncement by this Court of the governing principles, it is respectfully submitted that the granting of the writ in this case is of sufficient importance to warrant such action by this Court.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1952

No. .....

AIR TRANSPORT ASSOCIATES, INC., *Petitioner,*

v.

CIVIL AERONAUTICS BOARD, *Respondent.*

BRIEF OF AIRCOACH TRANSPORT ASSOCIATION, AS AMICUS CURIAE, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

INTRODUCTION

The Aircoach Transport Association is an organization composed of some forty Large Irregular Air Carriers. The instant petitioner is a member of this Association. The carriers who form the Association provide air transportation under "Letters of Registration" and are classified as Large Irregular Carriers. They operate over 800 million passenger-miles per year. They constitute an important part of the national air transportation system.

In this instant cause the Civil Aeronautics Board revoked the Letter of Registration held by the petitioner. This Court is asked to review the validity of that action. Because of the present and future importance to the members of this Association, of the issues raised in this cause, the Association submits the following brief in support of the petition for a writ of certiorari.

ARGUMENT IN SUPPORT OF GRANTING THE WRIT

I. The Status of the Regulations Is Confused and Confusing.

The Civil Aeronautics Act of 1938 (Act of June 23, 1938, 52 Stat. 937, 49 U.S.C. 401 *et seq.*)[1] creates a system of air transportation in which air carriers obtain certificates of public convenience and necessity from the Civil Aeronautics Board before engaging in business. Instead of issuing certificates for non-scheduled (now called "irregular") air transportation, the Board chose to issue "Letters of Registration" to irregular carriers. This was done pursuant to an economic regulation[2] issued by the Board in 1947 in accordance with proper rule-making procedure. An irregular carrier was defined, in that regulation, as a carrier which does not hold out a regular service to the public, and whose services "preclude an implication of a uniform pattern."

Thereafter, on December 10, 1948, the Board issued an "Interpretation No. 1,"[3] without any notice or hearing of any kind. This Interpretation utilized the technique of arranging actual flights on a calendar system, rather than examining the service which was held out to the public, as the basis for determining "regularity."

On May 20, 1949, the Board, through rule-making procedures, adopted a new definition of irregular carriers, which again was based upon the actual flights made rather than the holding out. This is the 1949 regulation.[4]

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1 Quoted at page 31 of the Petition for Writ of Certiorari.
2 Quoted at page 35 of the Petition for Writ of Certiorari.
3 Quoted at page 47 of the Petition for Writ of Certiorari.
4 Quoted at page 53 of the Petition for Writ of Certiorari.

Thus, the changes in the regulations have the effect of altering and modifying the original licenses issued to irregular air carriers. The change alters the type of service authorized as well as the extent to which the service may be provided.

§ 9(b) of the Administrative Procedure Act provides, in pertinent part:

> "Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, no withdrawal, suspension, revocation, or annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing and the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements."

Although the regulations aforesaid did, and continue to, attempt to modify licenses initially issued, none of those regulations was adopted in accordance with the mandatory provisions of § 9(b) of the Administrative Procedure Act.

As a result of the Board's actions since 1947, the irregular carriers have a bona fide dispute with the Board over the type and extent of service they are licensed to perform, and the authority of the Board to modify their licenses without adjudicatory-type hearings.

The new regulations issued by the Board actually are directed, of their own force, to take away existing operating rights held under a license. There is a sufficient degree of property right involved to invoke constitutional due process requirements for a hearing.[5]

Unless this Court grants the writ, and authoritatively states the extent to which the Civil Aeronautics Board may alter licenses without adjudicatory hearings, there will be no stability in an important segment of the country's air transport system.

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[5] See Netterville, *The Administrative Procedure Act: A Study in Interpretation*, 20 George Washington Law Rev. 1, 15 (1951).

There is always the further prospect that new and more restrictive interpretations and regulations may be issued in the same manner. For example, one such regulation, which would limit the carriers to only three trips per month between principal cities, is now stayed only until a pending case is concluded.[6]

It was thought that this Court would pass upon this far-reaching issue when the Court of Appeals for the District of Coulmbia Circuit certified questions in the case of *Civil Aeronautics Board et al.*, v. *American Air Transport, Inc., et al.*, No. 126, October Term, 1952. This Court, however, dismissed the certificate and the Circuit Court remanded the cause to the District Court for further proceedings.[7]

The instant proceeding, therefore, is the vehicle in which this issue arises. It is of paramount importance to the forty members of the Association, the operations of all of which will be influenced by the decision of the Court. It is of great importance to the supplying of adequate air transportation to meet the public convenience and necessity. The present status of the regulations is confusing; the irregular carriers are necessarily in doubt as to the type and extent of the service they are permitted to provide under their existing licenses. This Court has the opportunity to terminate much of this distressing uncertainty and hardship by granting the writ in the instant case.

II. This Court Has Never Construed These Sections of Statutes Involved.

The instant case presents a fundamental issue under the Administrative Procedure Act. A primary issue is raised with respect to the extent to which the Administrative Procedure Act protects licenses. This Court has not construed the Act in this respect. The United States Court of Appeals

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[6] Civil Aeronautics Board Regulation 291.29, Amendment No. 5, 16 F. R. 6503.

[7] *Civil Aeronautics Board et al.*, v. *American Air Transport et al.*, App. D.C. —— F. 2d ——, decided November 20, 1952, No. 11,115.

for the District of Columbia Circuit has held that a license may not be taken away without due process of law. *In re Carter*, 177 F. 2d 75. In the instant case, the Board has attempted to amend and restrict the license right by issuing regulations which have that effect. The validity of such regulations, under the Administrative Procedure Act, should be determined by this Court.

III. Conflicts of Principle Should Be Resolved by This Court.

The Board, by an interpretation and re-definition of existing regulations, changes the business and license of an air carrier, and then orders the carrier to cease all operations for an alleged violation of the "interpretation." In the motor carrier field, the Interstate Commerce Commission reached exactly the opposite conclusion. The Commission had a definition of "commercial zone" which could reasonably have been construed to include Windsor in the Detroit zone. Thereafter, the Commission changed its definition to eliminate Windsor. However, the Commission held that an existing licensee could continue to operate to Windsor (until his application was heard) because the change in the Commission's position was the equivalent of a "withdrawal" of a license within the meaning of § 9(b) of the Administrative Procedure Act. *John E. Merrifield Common Carrier Application*, No. M. C. 112991, decided October 16, 1952.

The principles applied by the Commission to the motor carrier are exactly opposite from those applied by the Board to the irregular air carrier. This conflict in principle should be resolved by this Court.

CONCLUSION

The issues are of vital concern to the irregular air carrier industry; they are of such concern to the whole air transportation industry, domestic and foreign. The issues are important to that part of the public which relies upon the irregular carriers' service. There is a precedent-making

need for a pronouncement by this Court of the principles of law to govern the application of confusing regulations. We submit that the grant of the writ in this case would be of sufficient public consequence to warrant such action by this Court.

Respectfully submitted,

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November 29, 1952